

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN RAY SCHULTZ,

Defendant.

2:09-cr-0248-LDG-RJJ

**ORDER**

Title 28 U.S.C. § 636 dictates that the district court is required to make a de novo determination to resolve objections to a magistrate judge's report and recommendation. Here, at defendant Schultz' request, the court conducted an evidentiary hearing on September 9, 2010, to review the magistrate judge's credibility determinations supporting his report recommending the denial of Schultz' motion to suppress. Detectives Joseph Giannone and David Denton, and Officers John Quintana and Robert Grantham testified for the government; and Charlene Jennings testified on behalf of Schultz. Unless otherwise addressed, the court adopts the magistrate judge's recitation of the background facts.

Schultz asserts that Detective Giannone's inconsistent testimony regarding the undercover surveillance and traffic stop of Schultz is reason to reject the magistrate judge's credibility determination. The court agrees that discrepancies exist between Detective Giannone's testimony

1 before the magistrate judge and the record. Most notably, Detective Giannone initially gave  
2 conflicting testimony before the magistrate judge regarding whether it was he or Sergeant Siwy  
3 who first reacquired visual contact of Schultz' car after the officers lost sight of him. The  
4 relocation of Schultz' car is important because it apparently occurred only moments before  
5 Detective Giannone also observed Schultz run the stop light at Ford Avenue and Las Vegas  
6 Boulevard—the traffic infraction for which Schultz was ultimately stopped by police. On direct  
7 examination before the magistrate judge Detective Giannone testified that he “believe[d]” it was  
8 Sergeant Siwy who rediscovered Schultz, which Detective Giannone reaffirmed under cross  
9 examination with respect to the interpretation of the CAD report. After a break in which Detective  
10 Giannone discussed his memory of events with the prosecutor, Detective Giannone corrected his  
11 testimony and stated that after having his recollection refreshed during the break, it was he, not  
12 Sergeant Siwy, who initially saw Schultz after they had lost him.

13       The court finds, however, Detective Giannone's explanation for the apparent conflict in his  
14 testimony to be believable. During cross examination before the magistrate judge, Detective  
15 Giannone was responding to questions related to the CAD report's reflection that Sergeant Siwy  
16 re-spotted Schultz, and could have understandably been confused about whether it was the  
17 questions regarding the CAD report or his own spotting of Schultz. The CAD report, which is  
18 essentially a log of communications with dispatch, did not reflect Detective Giannone's  
19 corroborated testimony that he was using his cell phone in contact with the other detectives, rather  
20 than dispatch, at the time of Schultz' relocation. And his lack of firmness in his direct testimony  
21 before the magistrate judge about who first spotted Schultz is not extraordinary given that the  
22 events had occurred almost a year previously, and the CAD report's reference only to Sergeant  
23 Siwy's communications with dispatch during the relevant time period.

24       Moreover, as the magistrate judge noted during the suppression hearing, while it seems  
25 irregular that Detective Giannone's original report lacked many of the details which were  
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1 subsequently added by his supplemental report just days before the suppression hearing, the court  
2 finds credible Detective Giannone's undisputed testimony before this court that the original report  
3 was directed to the probable cause for the eventual stop, rather than the other aspects of the  
4 surveillance and investigation. In addition, Detective Giannone's explanation regarding not  
5 revealing his undercover vehicle, as opposed to his own identity, is supported by his actions during  
6 the surveillance and stop, and by other witnesses' testimony.

7 Schultz introduced Charlene Jennings, Schultz' passenger when his car was stopped, to  
8 testify that Schultz did not run the stop light at Ford Avenue and Las Vegas Boulevard. The court  
9 notes that Jennings has been convicted related to forgery and, given her previous relationship with  
10 Schultz, her denial that Schultz ran the stop light, and her rationale regarding the traffic volume  
11 and possible police presence on Las Vegas Boulevard does not adequately undermine Detective  
12 Giannone's testimony and report to other officers that he observed Schultz run the light. Nor was  
13 there any impropriety in the decision of the police to impound the car, which was illegally parked  
14 at the stop, and neither of whose occupants carried a valid driver's license. Finally, the court finds  
15 reasonable and warranted the police restraint in not attempting to enter the store to approach  
16 Schultz, and the twenty-minute delay after the infraction to make the stop once Schultz was back  
17 on the road was not unreasonable.

18 Schultz also argues that the government failed to meet its burden to show that Schultz  
19 waived his Miranda rights and voluntarily spoke with detectives, admitting that there was a gun in  
20 his car, and describing it and its exact location. The parties agreed to the court's review of Schultz'  
21 testimony on this subject before the magistrate judge in lieu of his testimony at the de novo  
22 hearing, and the court notes that Schultz consistently denied receiving and waiving his Miranda  
23 rights and admitting to the gun in the car. The court is troubled by the detectives' choice to  
24 verbally inform Schultz of his Miranda rights, and proceed without a signed waiver or tape  
25 recording, in a case in which the police had, up to that point, invested such interest, time and  
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1 resources. The court also has some difficulty with the detectives' decision not to seek a written  
2 consent from Schultz to recover the gun from the car when, according to the detectives' testimony,  
3 the interview was cooperative and Schultz had readily waived his Miranda rights, confessed to  
4 having the gun in his car, and described its exact location. Instead, the detectives chose to  
5 terminate the interview, prepare an affidavit, and seek a telephonic warrant from a judge to search  
6 the car. However, the court also recognizes that police department policy does not require  
7 recorded or written waivers of Miranda rights, and that the acquisition of a search warrant, as  
8 opposed to seeking written consent from Schultz to search the car, was a legitimate option for the  
9 detectives to pursue in locating the gun.

10 Moreover, the court finds the testimony of Detective Giannone and Detective Denton  
11 regarding the circumstances relating to the interview of Schultz, his Miranda waiver and  
12 subsequent confession regarding the gun, to be consistent. Tellingly, the affidavit in support of the  
13 search warrant prepared by Detective Denton after the jail interview with Schultz contains details  
14 about the type of gun and its specific location in the car. The clear implication is that the  
15 additional information was acquired during the interview with Schultz. Based on the detectives'  
16 acquisition of the specific information related to the gun and its location, the consistency of the  
17 detectives' testimony regarding the circumstances related to the interview, and the demeanor of  
18 both, the court finds that the testimony of Detective Giannone and Detective Denton related to the  
19 jail interview is credible.<sup>1</sup>

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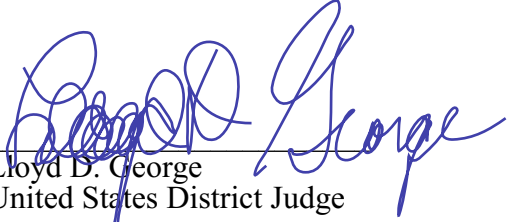
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23 <sup>1</sup>Needless to say, because the court's credibility determination involving Detective Giannone  
24 and Detective Denton relies heavily on the implication that neither detective nor any other person at  
25 either detective's direction gained access to Schultz' car between the time that the car was towed and  
26 the judicial approval of the request for the issuance of the search warrant, it would be incumbent on  
the government and the detectives to inform the court if any such access to the car, in fact, occurred.

1 Accordingly, after a de novo review, and except as otherwise indicated in this order,  
2 THE COURT HEREBY ADOPTS the magistrate judge's report and recommendation  
3 (#38), and ORDERS that defendant Schultz' motion to suppress (#18) is DENIED.  
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5 Dated this 13 day of September, 2010.

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8 Lloyd D. George  
United States District Judge  
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